IN THE COURT OF APPEAL OF MANITOBA

B E T W E E N:

THE MANITOBA GOVERNMENT AND GENERAL EMPLOYEES' UNION	)	***G. H. Smorang, Q.C.*** *and* ***J. B. Harvie*** *for the Applicant*
Applicant	)	
	)	***S. M. Walsh*** *for the Respondent*
- and -	)	
	)	***W. G. McFetridge*** *and* ***H. S. Leonoff, Q.C.*** *for the Attorney General of Manitoba*
THE HONOURABLE EDWARD HUGHES **in his capacity as Commissioner under *The Manitoba Evidence Act* and appointed pursuant to Order in Council No. 89-2011, dated the 23rd day of March, 2011**	)	*Chambers motion heard:* ***February 9, 2012***
Respondent	)	*Decision pronounced:* ***February 16, 2012***

FREEDMAN J.A.

OVERVIEW

1 The applicant union has standing as a party in an inquiry (the Inquiry) before the respondent, and has questioned the validity of the Inquiry and the jurisdiction of the respondent. It requested the respondent to state a case on the matter to the Court of Appeal, pursuant to provisions in *The Manitoba Evidence Act*, C.C.S.M., c. E150 (the *Act*). The respondent refused to do so. The applicant has now applied, pursuant to the *Act*, for an order requiring the respondent to state a case. For the reasons which follow, I decline to make the order.

BACKGROUND

2 The Lieutenant Governor in Council (the LGIC) enacted Order in Council 89/2011 (the OIC) on March 23, 2011, appointing the respondent as commissioner to inquire into certain matters relating to and arising out of the brief life and tragic death of Phoenix Sinclair. As the motion brief of the Attorney General of Manitoba (the AG) states:

> Phoenix Sinclair was born on April 23, 2000 and died in 2005. Throughout her short life, her family was involved with the child welfare system. Her mother and step-father were convicted of murder in respect of her death. ….

3 Shortly after her death, two reviews of the Manitoba child welfare system were conducted. One was an "external review" and the other was an "internal review." It appears that the latter was conducted pursuant to statutory provisions, the present version of which will be referred to below.

4 The Chief Medical Examiner also conducted an investigation into her death, pursuant to then s. 10(1) of what is now *The Fatality Inquiries Act*, C.C.S.M., c. F52 (the *FIA*).

5 In October 2006, the then Premier of the Province announced that an inquiry would be conducted into the circumstances surrounding the death of Phoenix Sinclair and the handling of her case by the child welfare system.

6 The criminal law process was not completed for several years. Thereafter, the LGIC enacted the OIC. It was enacted pursuant to the powers granted by s. 83 of the *Act* which is contained in Part V, entitled

"Respecting Commissioners Appointed For Public Inquiries." The section reads:

> **Appointment of commission**
> **83(1)** Where the Lieutenant Governor in Council deems it expedient to cause inquiry to be made into and concerning any matter within the jurisdiction of the Legislature and connected with or affecting
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> . . . . .
>
> (c) the administration of justice within the province;
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> . . . . .
>
> (f) any matter which, in his opinion, is of sufficient public importance to justify an inquiry;
>
> he may, <u>if the inquiry is not otherwise regulated</u>, appoint one or more commissioners to make the inquiry and to report thereon.
>
> [emphasis added]

7 The full OIC is attached hereto as Schedule A. The respondent was appointed:

> … [T]o inquire into the circumstances surrounding the death of Phoenix Sinclair and, in particular, to inquire into:
>
> (a) the child welfare services provided or not provided to Phoenix Sinclair and her family under *The Child and Family Services Act* [C.C.S.M., c. C80];
>
> (b) any other circumstances, apart from the delivery of child welfare services, directly related to the death of Phoenix Sinclair; and
>
> (c) why the death of Phoenix Sinclair remained undiscovered for several months.
>
> . . . . .

8 The OIC requires the respondent to make recommendations "to better protect Manitoba children" and to take into account the implemented recommendations in prior reviews. It stipulates that:

> 3. To avoid duplication in the conduct of the inquiry and to ensure recommendations relevant to the current state of child welfare services in Manitoba, the commissioner must consider the findings made in the following reviews and the manner in which their recommendations have been implemented. He may give the reviews any weight, including accepting them as conclusive:
>
> (a) A Special Case Review In Regard To The Death Of Phoenix Sinclair, Andrew J. Koster and Billie Schibler (September, 2006)
>
> (b) Investigation into the Services Provided to Phoenix Victoria Hope Sinclair, Department of Justice, Office of the Chief Medical Examiner (September 18, 2006)
>
> (c) Strengthen The Commitment An External Review of the Child Welfare System, Michael Hardy, Billie Schibler and Irene Hamilton (September 29, 2006)
>
> (d) "Honouring Their Spirit", The Child Death Review: A Report to the Minister of Family Services and Housing, Province of Manitoba, Billie Schibler and James H. Newton (September, 2006)
>
> (e) Strengthening our Youth: Their Journey to Competence and Independence, A Report on Youth Leaving Manitoba's Child Welfare System, Billie Schibler, Children's Advocate, and Alice McEwan-Morris (November, 2006)
>
> (f) Audit of the Child and Family Services Division, Pre-devolution Child in Care Processes and Practices, Carol Bellringer, Auditor General (December, 2006).

9 The OIC requires that all reports made by the respondent "must be in a form appropriate for public release," and refers to certain matters that must

occur "[b]efore public hearings take place."

10 At the end of June 2011, the respondent granted standing to a number of persons or organizations, as parties or as interveners. Party standing was granted to the Department of Family Services and Consumer Affairs of the Government of Manitoba, and to the applicant, among others.

11 The presentation of evidence is scheduled to commence on May 23, 2012.

THE REQUEST TO STATE A CASE TO THE COURT OF APPEAL

12 On January 31, 2012, the applicant wrote to the respondent requesting that he state a case to this court. That request was based on s. 95(1) of the *Act.* The entire s. 95 reads:

> **Stated case for Court of Appeal**
> **95(1)** Where the validity of a commission issued under this Part or the jurisdiction of a commissioner appointed thereby or the validity of any decision, order, direction, or other act, of a commissioner appointed under this Part, is called into question by any person affected, the commissioners, upon the request of that person, shall state a case in writing to The Court of Appeal setting forth the material facts, and the decision of the court thereon is final and binding.
>
> **Order directing stated case**
> **95(2)** Where the commissioners refuse to state a case, any person affected may apply to a judge of the court for an order directing the commissioners to do so.
>
> **Proceedings stayed until case determined**
> **95(3)** Pending the decision of the stated case no further proceedings shall be taken by the commission.

> **Action or injunction not to lie against commissioner**
> **95(4)** No action shall be brought or other proceeding taken with respect to anything done, or sought to be done, by a commissioner or to restrain or interfere with, or otherwise direct or affect the conduct of any commissioner.
>
> [emphasis added]

13 Section 95 refers to two categories of matters that may be questioned by a person affected. One relates to the validity and jurisdiction of the commission itself; the other relates to the validity of decisions, orders, directions or acts of the commissioner. The applicant's request falls into the first category.

14 The applicant submitted to the respondent that under s. 83(1) of the *Act* an inquiry can only be established to inquire into certain matters "if the inquiry is not otherwise regulated." The applicant said that the subject-matter of the Inquiry was regulated by the provisions of *The Child and Family Services Act*, C.C.S.M., c. C80 (the *CFSA*) and the *FIA*, and that those statutes "provide for exactly the same inquiry" as set out in the OIC.

15 The applicant requested that the respondent state a case to the Court of Appeal on the following questions:

> a) Are the matters and obligations particularized in paragraphs 1 and 2 of Order in Council No. 89/2011 dated March 23, 2011 appointing The Honourable Edward (Ted) Hughes as commissioner to inquire into the circumstances surrounding the death of Phoenix Sinclair, an inquiry otherwise regulated by *The Child and Family Services Act*, C.C.S.M. c. C80 and *The Fatality Inquiries Act*, C.C.S.M. c. F52, as defined in section 83(1) of *The Manitoba Evidence Act*, C.C.S.M. c. E150?
>
> b) If the answer to question 1 is yes, in whole or in part, is the commission properly appointed and does the commissioner have

the jurisdiction to inquire into those particularized matters?

16 The respondent replied on February 3, 2012, stating that he had "given your request careful consideration and have decided to refuse to state a case." He also noted that ten months had elapsed since the Inquiry was established, that much work had been done in preparation for the hearings which were to commence on May 23, 2012, and that "[i]t is in the public interest that the timetable circulated to all counsel several months ago be maintained."

THE APPLICATION FOR AN ORDER DIRECTING THE COMMISSIONER TO STATE A CASE

17 Upon the respondent's refusal to state a case, the applicant filed a notice of motion in this court pursuant to s. 95(2) of the *Act*. That motion sought an order directing the respondent to state a case, in substantially the terms earlier proposed to the respondent. The notice of motion named only the respondent as a responding party.

18 The applicant filed a second notice of motion, expanding upon its first, describing that second notice as a "Notice of Constitutional Question." The next day the AG filed a notice of motion seeking intervener status. This was done because the matter that had been called into question under s. 95 fell into the first category described in para. 13 above, and it was considered appropriate that the AG, and not the respondent, defend the validity of the OIC and the jurisdiction of the respondent as commissioner.

19 The applicant objected to the participation of the AG at the hearing, although it stated it would have no objection to such participation at a

hearing on the merits before the full court if a case were to be stated. The applicant's view was that the AG had no status to participate at this stage.

20 In addition to counsel for the applicant, present at the hearing of the s. 95(2) motion were counsel for the AG, counsel for the respondent, counsel for the Attorney General of Canada, and a number of other counsel representing persons with party standing or intervener standing. The only counsel who indicated any position on the motion were counsel for the applicant and for the AG. Counsel for the respondent agreed that it was appropriate that the AG defend the validity of the OIC.

ISSUES

21 The issues to be decided may be summarized as follows:

1. Does the AG have status on the present motion?

2. What is meant by the word "shall" in the following phrase in s. 95(1) of the *Act*: "the commissioners … shall state a case …"?

3. What is the role of a judge of this court under s. 95(2) of the *Act*?

4. Has the applicant met the applicable standard entitling it to an order directing the respondent to state a case to this court?

Status of the AG on this motion

22 The applicant argued that the subject-matter of the Inquiry is regulated by other provincial laws, and the LGIC therefore had no authority to enact the OIC. What is challenged by the applicant is the validity of that executive

act. The AG is the chief law officer of the Crown, and, in my view, it is entirely appropriate that he assume the responsibility in this matter, and at this stage, for defending the validity of the act of the LGIC. He is far better placed than the respondent to present the case for the validity of the OIC. The AG has a real and direct interest in the matter before me.

23 The applicant properly identified the respondent as the party who should be named "respondent" in the present proceedings, since under s. 95(2), any order would be directed to him. But, in my opinion, the applicant could also have joined the AG as a party respondent, since the application for a stated case calls into question an enactment of the executive branch of government.

24 For that reason, I allowed counsel for the AG to make her submission in response to the submission of the applicant. As to status, either the AG should be added as a party respondent to these proceedings, or should be granted intervener status. On adding the AG as a party, see the judgment of this court in *Telecommunication Employees Association of Manitoba Inc. et al. v. Manitoba Telecom Services Inc. et al*., 2007 MBCA 85, 214 Man.R. (2d) 284. Scott C.J.M. referred (at para. 67) to Rule 5.03(3) of the Queen's Bench Rules:

> **Power of court to add parties**
> **5.03(3)** The court may order that any person who ought to have been joined as a party or whose presence as a party is necessary to enable the court to adjudicate effectively and completely on the issues in the proceedings shall be added as a party.

25 He said (at paras. 68-70):

> The scope of these rules was recently considered by this court in **CTV Television Inc. v. R. et al.**, (2005), 201 Man.R. (2d) 38; 366 W.A.C. 38; 2005 MBCA 120, and **Greyhound Canada Transportation Corp. et al. v. Motor Transport Board (Man.)** (2006), 208 Man.R. (2d) 281; 383 W.A.C. 281; 2006 MBCA 140. The two decisions stand for the proposition that Queen's Bench Rule 5.03 is directed toward those who are an integral part of the lis, and not persons who arguably may have some kind of identifiable interest or common question with the other parties to the proceedings.
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> In **Save The Eaton's Building Coalition v. Winnipeg (City) et al.** (2001), 160 Man.R. (2d) 236; 262 W.A.C. 236; 2001 MBCA 186, Helper, J.A., for the court, bluntly stated (at para. 44):
>
> > … my review of the historical development of Rule 5.03(3) and the clear reading of the rule does not allow the court to add a party just because it may be convenient or just to do so. …
>
> There, as with Fox and Singleton, the proposed parties' legal rights would not be affected by the outcome of the proceedings. Helper, J.A., concluded that Rule 5.03(3) was only available to "those who have a direct interest in the dispute before the court" (at para. 47).

26 I am satisfied that the AG represents the entity which has the most direct interest in the present matter. In the words of the Rule, his "presence as a party is necessary to enable the court to adjudicate effectively and completely on the issues."

27 The AG's position in correspondence with the applicant was that, since the OIC is, under *The Interpretation Act*, C.C.S.M., c. I80, a "regulation," he was entitled to be a party by virtue of s. 7(6) of *The Constitutional Questions Act*, C.C.S.M., c. C180. In light of my decision on this particular issue, I need not come to any conclusion on that position.

28 Had the motion for intervention not been filed (as counsel said, out of an abundance of caution), I would have ordered that the AG be added as a

party. However, since the AG has moved to be granted intervener status, it is appropriate that I grant that motion. While the applicant suggested that the AG's motion did not accord with the applicable Court of Appeal Rules on intervention (see Rule 46.1), I am satisfied that the motion does, in substance, satisfy the requirements of the rules.

29 Accordingly, the AG has status as intervener in these proceedings.

The meaning of "shall" in "the commissioners … shall state a case …"

30 The position of the applicant is that when the request was made to the respondent to state a case, the respondent had no option but to do so. It argued that:

> The word "shall" when used in legislation imposes an obligation, creates a prohibition or requirement and is always imperative. The person who "shall" do something has no discretion to decide whether or not to do it. When the word "shall" is used in legislation, the usual question for the Court to determine is not whether the action or prohibition on action is imperative, but what the consequences are for non-compliance.

31 The applicant relied on several authorities, including *The Interpretation Act* (at s. 15: "In the English version of an Act or regulation, "shall" and "must" are imperative and "may" is permissive and empowering."), and the decisions of this court in *J & R Property Management et al. v. Kenwell*, 2011 MBCA 5, 262 Man.R. (2d) 164, and *B.W. v. Child and Family Services of Winnipeg*, 2009 MBCA 95, 245 Man.R. (2d) 186.

32 The applicant described the respondent as having a "mandatory statutory obligation" to state a case, upon request by any person affected.

33 The AG responded that "the fundamental rule of statutory interpretation is that statutes should be interpreted … in a manner that makes sense." It cited the unanimous decision of the Supreme Court of Canada in *Re Manitoba Language Rights*, [1985] 1 S. C. R. 721 (at para. 27):

> As used in its normal grammatical sense, the word "shall" is presumptively imperative. …. … Parliament, when it used the word "shall" in s. 23 of the *Manitoba Act, 1870* and s. 133 of the *Constitution Act, 1867*, intended that those sections be construed as mandatory or imperative, in the sense that they must be obeyed, unless such an interpretation of the word "shall" would be utterly inconsistent with the context in which it has been used and would render the sections irrational or meaningless. ….

34 The AG said that if s. 95 is construed as requiring the respondent to state a case to the Court of Appeal every time a person affected requests that he do so, s. 95(2) would be meaningless. That section, it said, contemplates a refusal to state a case, so "shall," while imperative, is not mandatory.

35 In my opinion, it is an untenable interpretation of the *Act* that a case must be stated (with the consequential suspension of the entire work of a commission; see s. 95(3)), every time a party affected so requests, without regard to all relevant circumstances, including the justifiability of the request. Such an interpretation would be inconsistent with the object of the statutory provisions and the intention of the Legislature in enacting them, and could impose unjustified consequences seriously prejudicial to the work of a commission. The better view is that where used in s. 95(1), "shall" is directory and not mandatory.

36 The "golden rule" of statutory interpretation is that referred to as "Driedger's Modern Principle" (see Ruth Sullivan, *Sullivan on the Construction of Statutes*, 5th ed. (Markham: LexisNexis Canada Inc., 2008) at 1 *et seq*.), namely, that "the words of an Act are to be read in their entire context, in their grammatical and ordinary sense harmoniously with the scheme of the Act, the object of the Act, and the intention of Parliament."

37 As has been said in numerous decisions, while "shall" imposes an obligation, the real question is to determine the consequences of failure to comply. In *B.W.*, Hamilton J.A. (at paras. 36-42) articulated a thorough explanation of the mandatory/directory question, which I will not repeat here. It was neatly encapsulated in her concurrent decision in *J.W.F. v. Child and Family Services of Western Manitoba*, 2009 MBCA 96, 245 Man.R. (2d) 176 (at para. 39):

> In **B.W.**, the court explains the difference between directory and mandatory statutory provisions and comments on the analysis that is required when interpreting the intent of the legislature in this regard. It is sufficient here to state that the crucial factors for this analysis are the object and purpose of the legislation and the effect of ruling the provision mandatory or directory. See **B.W.**, at para. 42. If mandatory, the non-compliance cannot be cured or disregarded, no matter the circumstances. If directory, it is within the discretion of the court whether the non-compliance should be disregarded or cured. See **B.W.**, at para. 46.

38 See also the comments of Rothstein J. in *Alberta (Information and Privacy Commissioner) v. Alberta Teachers' Association*, 2011 SCC 61 at paras. 73-75.

39 In *Blueberry River Indian Band v. Canada (Department of Indian Affairs and Northern Development)*, [1995] 4 S.C.R. 344, McLachlin J., as she then was, wrote (at para. 42):

> …. This Court has since held that the object of the statute, and the effect of ruling one way or the other, are the most important considerations in determining whether a directive is mandatory or directory ….

40 In *B.W.*, Hamilton J.A. said (at para. 42):

> While the factors have been described in different ways in the case law, they consistently focus on the two considerations explained in **Blueberry**; the object and purpose of the legislation and the effect of ruling the provision mandatory or directory. The latter really focusses on the effect of automatic nullification if the provision is mandatory.

41 If the approach proposed by the applicant was correct, the result would be that the work of a commission could be brought to a halt, at any time, and from time to time, by any party affected who called into question any matter referred to in s. 95(1), even if there was little or no merit in that party's request for a stated case. It is not difficult to imagine that parties who are apprehensive about what a commissioner might report could seek to obstruct the proceedings by this method, perhaps on a repeated basis, and perhaps with little justification for the requests. The commissioner would have no choice under the *Act* but to state the case as requested and suspend all proceedings. In my view, that cannot have been the intention of the Legislature when it used the word "shall" in s. 95(1).

42 The object and purpose of s. 95(1) is to provide a mechanism whereby persons affected by a commission may question the commission's validity

and jurisdiction, or decisions, orders, directions or acts of the commissioner. In responding, the commissioner is entitled to evaluate the request for the stated case and to exercise judgment on its justifiability. To deny the commissioner that exercise of judgment would render him or her a mere automaton. That surely cannot be what was intended. Some evaluation of the justifiability of the request for a stated case is necessary.

43 The applicant requested a stated case on the basis that the subject-matter of the Inquiry was regulated by certain statutory provisions, which it identified. It stated in its request that it was not setting out its entire position. The respondent replied that he had given the matter careful consideration. Obviously he had evaluated the request for the stated case, and did not agree that the subject-matter of the Inquiry was otherwise regulated. In my view, that judgment was within his authority to exercise.

44 Applying the principles consistently stated in the jurisprudence, and considering the object of the statutory provisions and "the effect of ruling one way or the other" (*Blueberry* at para. 42), I am satisfied that the word "shall" in s. 95(1) should not be construed as mandatory, but as directory. Thus, the commissioner may refuse to state a case, in which event the person affected has the recourse provided by s. 95(2). That recourse has been sought in this case.

The Role of the Judge under s. 95(2)

45 The applicant argued that this section does not create an obligation on the part of an affected person "to obtain leave for … a stated case." It said that, "like any appellant where leave is not required, [it had] the right to have the stated case determined by a full panel" of the court. It relies on the

following dicta in the chambers decision of Steel J.A. in *Anderson et al. v. Manitoba et al.*, 2009 MBCA 129, 251 Man.R. (2d) 82 (at para. 20):

> The applicants have argued that the process of a stated case is so uncommon that there are no specific applicable rules, but this is not really correct. While the **Court of Appeal Act** and **Rules** do not specifically address the subject, a stated case is perhaps better described as "an appeal by way of stated case."

46 The applicant argued that I should peremptorily make the order sought, especially since the respondent gave no reasons for his refusal.

47 The AG responded that the role of the judge under s. 95(2) "cannot be to simply 'rubber stamp' the request of the affected party" and that the judge acts as a "gatekeeper." While leave is not required, the AG argues that the judge's role is like that of a chambers judge in a case where leave is required, determining whether it should be granted. That judge would typically consider whether the legal issue raised was important, and whether the applicant had made out a *prima facie* case.

48 In my view, the AG is correct. A stated case may be a form of appeal, but this particular stated case would come into being entirely through the operation of s. 95 of the *Act*. The *Act* must be read purposively. Just as the commissioner is entitled to evaluate the request for a stated case, for the reasons explained above, including the effect of s. 95(3), so, too, is the judge entitled to conduct such an evaluation. It would be anomalous, and incorrect, to find that the judge faced with a motion under s. 95(2) has less discretion and room for the exercise of judgment than a commissioner has when faced with a request under s. 95(1).

49 If the applicant's position was correct, one would expect that the *Act* would simply entitle a party whose request is refused by a commissioner to submit its stated case directly to a panel of the Court of Appeal for determination. There would be no need for any intermediate procedure before a single judge. Instead, the *Act* does require the present step, requiring the affected person to "apply" to a judge, which supports the AG's argument that what is to be exercised now is a "gatekeeper" function.

50 The only substantive judicial consideration of s. 95, so far as I am aware, is the decision of this court in *Johnson et al. v. Manitoba Police Commission et al.* (1978), 91 D.L.R. (3d) 535. An inquiry was established appointing the Manitoba Police Commission to inquire into certain matters. That inquiry was governed by Part V of the *Act* (in its then form) and by what was then s. 97, now s. 95. The plaintiffs objected on jurisdictional grounds to the Commission doing its work. The plaintiffs had moved in the Court of Queen's Bench for a stay of all proceedings until their claim, for a declaration that the Commission lacked jurisdiction, could be heard at a trial. The matter came to this court.

51 For a unanimous court Matas J.A. said, referring to a decision by Guy J.A. in chambers (at p. 538):

> In his judgment the learned Chambers Judge held that the proper procedure for the plaintiffs to have followed was that contemplated under s. 97 of the *Evidence Act*. ….

52 He then said (at p. 540):

> …. The appellants have not substantiated their allegations that a Court action must be substituted for the procedure which the Legislature has set out in s. 97.
>
> In my view, if the plaintiffs wish to challenge the jurisdiction of the Commission they may do so by asking the Commissioners to state a case to the Court of Appeal. Provision is made in s. 97(2) for application to a Judge of this Court for an order, if he is so minded, directing the Commissioners to state a case where there has been a refusal by them to do so. Pending a decision on the stated case, proceedings before the Commission are stayed.
>
> [emphasis added]

53 Manifestly, the conclusion that a judge of this court, on a motion under what is now s. 95(2), may, "if he is so minded," direct that a case be stated, is very strong support for the view I have expressed on this aspect of the matter, that the judge exercises a discretion and engages in a judicial evaluation of the applicant's position.

54 The law relating to leave applications, insofar as it explains the "gatekeeper" function of a chambers judge, is applicable by analogy. In those instances, an applicant must show that the issue it has raised is of some importance, and that the substantive argument it would advance to a full panel of the court has a reasonable chance of success. See, e.g., *Pelchat v. Manitoba Public Insurance Corp. et al.*, 2006 MBCA 90 (at para. 2):

> ….
>
> 2. The case must be one that warrants the attention of the court. ….
>
> 3. There must be an arguable case of substance; i.e., one with a reasonable prospect of success ….

55 Similarly applicable by analogy is the law relating to extensions of time, where, among other matters, an applicant typically must show that it has "an arguable case." See, e.g., *Clancy v. Harvey*, 2006 MBCA 123, 208 Man.R. (2d) 198. In that case, the applicant had (at para. 6):

> … [D]ifficulty … with the third element of the test for obtaining an extension of time (see, e.g., **Bohemier et al. v. CIBC Mortgages Inc.** (2001), 160 Man.R. (2d) 39; 262 W.A.C. 39; 2001 MBCA 161) and that is the requirement that he must show that he has an arguable ground of appeal. This element has been explained in a number of decisions in which it is made clear that the "arguable ground" factor means that the appeal must have some real merit. See **Branum v. Branum** (1998), 129 Man.R. (2d) 142; 180 W.A.C. 142 (C.A.), where Twaddle, J.A., said that an applicant must show "sufficient merit to the appeal to warrant the extension being granted" (at para. 9), and "[t]he test of merit does not require an applicant to show that the appeal will probably succeed. All the applicant need show ... is that the point or points to be argued have a reasonable chance of success" (at para. 11).

56 Thus, in my opinion, the role of the judge on an application such as this is to determine two matters. First, the judge determines if the applicant for the stated case has shown that the matter proposed to be determined is of some importance, warranting the attention of the court. If the work of a commission is to be suspended, that should only occur if the issue raised meets that standard. Second, the judge determines if the applicant has shown that the case it proposes be heard by the full court is an arguable case that has a reasonable prospect of success. Weak cases with little chance of success should not be sent for a hearing with the consequential suspension of the proceedings of a commission.

Has the applicant shown that it is entitled to the order requiring the respondent to state a case?

57 As indicated at the outset, I have concluded that the applicant has not met the applicable standard. Had I decided otherwise, I would be circumspect in this part of my reasons, since a decision on the merits of the stated case would be made in due course by a full panel of the court. In light of my decision on the application, I am less constrained.

58 In my opinion, the issue raised by the applicant is of sufficient importance to warrant the attention of the court. Section 83 has received, to my knowledge, no judicial consideration, and any analysis by the court of the concept of "otherwise regulated" would likely be of value in future cases. In my view, the first part of the test is met by the applicant.

59 The applicant's difficulty arises on consideration of whether its proposed stated case is an arguable case that has a reasonable chance of success. The applicant said that the subject-matter of the Inquiry is "otherwise regulated" within the meaning of s. 83. If that were so, the OIC should not have been enacted. The applicant said that certain provisions of the *CFSA* regulate that subject-matter:

> **Review after death of child**
> **8.2.3(1)** After the death of child who was in the care of, or received services from, an agency under this Act within one year before the death, or whose parent or guardian received services from an agency under this Act within one year before the death, the children's advocate
>
> (a) must review the standards and quality of care and services provided under this Act to the child or the child's parent or

guardian and any circumstances surrounding the death that relate to the standards or quality of the care and services;

(b) may review the standards and quality of any other publicly funded social services that were provided to the child or, in the opinion of the children's advocate, should have been provided;

(c) may review the standards and quality of any publicly funded mental health or addiction treatment services that were provided to the child or, in the opinion of the children's advocate, should have been provided; and

(d) may recommend changes to the standards, policies or practices relating to the services mentioned in clauses (a) to (c) if, in the children's advocate's opinion, those changes are designed to enhance the safety and well-being of children and reduce the likelihood of a death occurring in similar circumstances.

Purpose of review
8.2.3(2) The purpose of the review is to identify ways in which the programs and services under review may be improved to enhance the safety and well-being of children and prevent deaths in similar circumstances.

60 The *CFSA* also provides:

Report
8.2.3(3) Upon completing the review, the children's advocate must prepare a written report of his or her findings and recommendations and provide a copy of it

(a) to the minister;

(b) to the Ombudsman; and

(c) to the chief medical examiner under *The Fatality Inquiries Act*.

Children's advocate not to determine culpability
8.2.3(4) The report must not express an opinion on, or make a

determination with respect to, culpability in such a manner that a person is or could be identified as a culpable party in relation to the death of the child.

Report is confidential
8.2.3(5) The report is confidential and must not be disclosed except as required by subsection (3) or as permitted by subsection (6) or Part VI.

Summary of recommendations in annual report
8.2.3(6) The children's advocate's annual report under clause 8.2(1)(d) for a year may include a summary of the recommendations included in the reports made that year under this section.

61 The applicant said that the following provisions of the *FIA* also regulate the subject-matter of the Inquiry:

Inquiry as to deaths
7(5) Where a medical examiner or investigator learns of a death to which clause (9)(a), (b), (c) or (d) [death of a child] applies and the body is in the province, the medical examiner or investigator shall immediately take charge of the body, inform the police of the death and make prompt inquiry with respect to

(a) the cause of death;

(b) the manner of death;

(c) the identity and age of the deceased;

(d) the date, time and place of death;

(e) the circumstances under which the death occurred; and

(f) subject to subsection 9(2), whether the death warrants an investigation;

and shall submit an inquiry report on the above matters to the chief medical examiner and where the medical examiner or investigator decides that the death warrants an investigation, the medical

examiner or investigator shall provide the reasons for the decision.

Child's death to be reported to children's advocate
10(1) Upon learning that a child has died in Manitoba, the chief medical examiner must notify the children's advocate under *The Child and Family Services Act* of that death.

Reports to be given to children's advocate
10(2) If the children's advocate has jurisdiction to conduct a review under section 8.2.3 of *The Child and Family Services Act* in relation to the death of a child in Manitoba, the chief medical examiner must provide to the children's advocate, upon request,

(a) a copy of the medical examiner's report on the manner and cause of death; and

(b) a copy of the final autopsy report, if one has been ordered by the medical examiner and the children's advocate requires it for the review.

Reports are confidential
10(3) The information provided to the children's advocate under subsection (2) must not be used except for the purpose of a review and report under section 8.2.3 of *The Child and Family Services Act*, and must not be disclosed in that report except as necessary to support the findings and recommendations made in that report.

CME review of investigation report
19(1) Subject to subsection (3), upon receipt of an investigation report, the chief medical examiner shall review the report and determine whether an inquest ought to be held.

CME to direct holding of an inquest
19(2) Where the chief medical examiner determines under subsection (1) that an inquest ought to be held, the chief medical examiner shall direct a provincial judge to hold an inquest.

Ministerial direction for inquest
25 The minister may direct a provincial judge to conduct an inquest with respect to a death to which this Act applies.

Provincial judge to hold inquest
26(1) Where a direction is given by the chief medical examiner

> under section 19 or by the minister under section 25, a provincial judge shall conduct an inquest.
>
> **Duties of provincial judge at inquest**
> **33(1)** After completion of an inquest, the presiding provincial judge shall
>
> (a) make and send a written report of the inquest to the minister setting forth when, where and by what means the deceased person died, the cause of the death, the name of the deceased person, if known, and the material circumstances of the death;
>
> (b) upon the request of the minister, send to the minister the notes or transcript of the evidence taken at the inquest; and
>
> (c) send a copy of the report to the medical examiner who examined the body of the deceased person;
>
> and may recommend changes in the programs, policies or practices of the government and the relevant public agencies or institutions or in the laws of the province where the presiding provincial judge is of the opinion that such changes would serve to reduce the likelihood of deaths in circumstances similar to those that resulted in the death that is the subject of the inquest.

62 The applicant argued that all other common law provinces have statutes described as, for example, "The Public Inquiries Act," dedicated to commissions which hold public inquiries, whereas Manitoba does not have any such statute. It said that the words "public inquiry" do not appear in the *Act* nor does the *Act* establish any process for public inquiries. So "inquiry" should be given its plain and ordinary meaning, namely, "a formal or judicial investigation into a matter of public concern" (Canadian Oxford Dictionary, 2d ed.).

63 The applicant argued that the two statutes it relied on already provide for a "formal or judicial investigation" into the various matters outlined in

the OIC, albeit (apart from inquests) a non-public investigation, and so the subject-matter of the OIC is "otherwise regulated" by those statutes.

64 Alternatively, the applicant said that if s. 83 of the *Act* permits a public inquiry such as is contemplated, then the provisions of the *FIA* dealing with inquests already provide for such a public process. It argued that the respondent's mandate "is no broader or more comprehensive than the mandate of a judge presiding at an inquest" under the *FIA*.

65 The AG said that there was no Manitoba legislation that regulated the broad range of issues required to be dealt with by the respondent. He did identify two instances where Manitoba has "otherwise regulated" matters which might become the subject of a public inquiry. These are *The Trade Practices Inquiry Act*, C.C.S.M., c. T110 and *The Gaming Control Act*, C.C.S.M., c. G5.

66 With respect, I think the applicant's argument misconceives the nature and purpose of the Inquiry and the underlying OIC.

67 It will be useful to recall the scope of the Inquiry created by the OIC and the mandate given to the respondent. The context of the Inquiry is the circumstances surrounding the death of Phoenix Sinclair. The respondent is required to inquire into those circumstances, and is required in particular to inquire into child welfare services provided or not provided to Phoenix Sinclair and her family, into any other circumstance related to her death, and into why her death remained undiscovered for several months.

68 Moreover, he is also required to report his findings, to make recommendations to better protect Manitoba children, to ensure that his

recommendations are relevant to the current state of Manitoba child welfare services, to consider the findings in the six reviews described in para. 3 of the OIC, and to consider the manner in which the recommendations in those reviews have been implemented.

69 He is further required to deliver a final report (and may deliver interim reports) and all reports are required to be in a form appropriate for public release. He may conduct interviews before public hearings are held.

70 The Inquiry hearings will be held in public (subject to the respondent's ruling otherwise in any particular instance). The OIC, enacted pursuant to Part V of the *Act*, headed, "Respecting Commissioners Appointed For Public Inquiries," contemplates public hearings. In his statement announcing the plans to establish a commission of inquiry, the Premier stated, among other matters: "The public has a right to know how a child could go missing for nine months without it being noticed …." The respondent's report will be for public consumption.

71 In this case the AG "is strongly of the opinion that it is in the public interest to hold this inquiry." The LGIC has decided that the Inquiry's process and result should be subject to public scrutiny and exposure, although that is not a necessary aspect of an inquiry that might be constituted pursuant to s. 83. I am satisfied that the LGIC may establish a public inquiry under s. 83. The scale and scope of such an inquiry is not confined to a formal or judicial investigation, and is limited only by the provisions of s. 83.

72 The AG argued forcefully, and I think correctly, that this Inquiry under s. 83 of the *Act* is intended to be of a different nature and scope than

any review, investigation or inquest (or any combination thereof) that has been or that might be conducted pursuant to any other statute.

73 The OIC imposes obligations on the respondent, as commissioner, going beyond those imposed on any person who might conduct any other review, investigation or inquest under the two statutes in question. The OIC is, as counsel said, "tailor-made" to suit the particular combination of factors that were felt to require public investigation and report. Those factors include some that must be dealt with at an inquest or an investigation under the *FIA*, some that must be dealt with in a review under the *CFSA* and some that are not required to be dealt with under either of those statutes.

74 Some examples will suffice to illustrate. The applicant relied on s. 8.2.3 of the *CFSA*. The only task that the Children's Advocate must perform, in a review under s. 8.2.3(1) of the *CFSA*, is under clause (a), to review standards and quality of care and services and circumstances surrounding the death relating thereto. The purpose of such review (ss. (2)) is to identify ways in which programs and services may be improved. Importantly, the report resulting from the review is to be confidential (ss. (5)) and must not be disclosed. The Children's Advocate has no power to issue a subpoena, unlike the respondent. Manifestly, such a review would not encompass many of the matters that the LGIC has determined must be examined and, in any event, such a review would not meet the need, identified by the executive branch of government, of satisfying the public's right to know.

75 An inquiry by a medical examiner under the *FIA* (s. 7(5)) must identify the cause and manner of death, other details related to the death, and

the circumstances under which the death occurred. A medical examiner has no power to issue a subpoena. A report is to be made to the Chief Medical Examiner (the CME). The CME must provide certain of the information to the Children's Advocate, in a case such as that of Phoenix Sinclair. That information must generally be kept confidential by the Children's Advocate. Any other review or investigation (apart from an inquest) that might be conducted under the *FIA* is private and limited in scope. Clearly, these provisions fall short of ensuring that there will be an inquiry into and report (let alone a public report) upon many of the matters which are the subject-matter of the OIC.

76 That brings me to the provisions of the *FIA* regarding inquests. The CME or the government minister responsible for the *FIA* may, in certain cases (such as Phoenix Sinclair's), direct that an inquest be held into a death. The inquest is conducted by a provincial judge, who has the power to issue subpoenas. An inquest is generally open to the public.

77 The mandate of the inquest judge (s. 33(1)(a)) is to report to the minister:

> ….
>
> … [S]etting forth when, where and by what means the deceased person died, the cause of the death, the name of the deceased person, if known, and the material circumstances of the death;
> ….

78 There are no other matters on which the inquest judge must report. The applicant argued that inquest judges often submit reports which include wide-ranging recommendations (as permitted by s. 33(1)). The AG correctly observes that the only matters that are required and thus certain to

be reported upon are those stipulated in s. 33(1)(a) as set out above. An inquest judge may make recommendations which "would serve to reduce the likelihood of deaths in circumstances similar" (s. 33(1)(c)) to Phoenix Sinclair's, but there is no means under the *FIA* for the LGIC to ensure that that will be done. The terms of reference of an inquest are prescribed in and proscribed by the *FIA*. They cannot be supplemented by the LGIC.

79 It is noteworthy that in this particular case, some of the s. 33(1)(a) matters are already publicly known, as a result of the criminal trial and appeal.

80 An inquest is not a commission of inquiry. As was said recently in *Canadian Union of Public Employees (Toronto Civic Employees Union), Local 416 v. Lauwers*, 2011 ONSC 1317 (QL) (at para. 78):

> The Coroner appears to have determined to undertake a broad ranging inquiry into paramedics' right to strike. However, as noted in BADC v. Huxter, [(1992), 11 O.R. (3d) (Div. Ct.)], an inquest is not to be a Royal Commission or public inquiry. "A coroner's inquest is not the occasion for a roving investigation into general public concerns" ….

81 The LGIC has made it clear that it requires to know certain matters that would not have to be reported on by an inquest judge, such as the child welfare services provided (or not) and why the death remained undiscovered for several months. There could be no assurance that all the concerns and questions identified by the LGIC and set out in the OIC would be addressed by an inquest judge.

82 In comparison, the LGIC can, subject to s. 83, establish an inquiry with such jurisdiction as it thinks appropriate to the need. See Ed Ratushny,

The Conduct of Public Inquiries: Law, Policy and Practice (Toronto: Irwin Law Inc., 2009) (at p. 24):

> …. … [A] commission of inquiry derives its jurisdiction not only directly from its statute but also, in a supplemental way, from its terms of reference. The *Inquiries Act* "delegates" to the government the power to define a commission's jurisdiction through an order in council. This enables the government to give each commission a different mandate tailored to the specific problem to be addressed. This elaboration on the powers granted by the Act has legal effect in specifying the jurisdiction of the commission.

83 In *Phillips v. Nova Scotia (Commission of Inquiry into the Westray Mine Tragedy)*, [1995] 2 S.C.R. 97, Cory J. commented on the unique nature of commissions of inquiry (at para. 60):

> …. As *ad hoc* bodies, commissions of inquiry are free of many of the institutional impediments which at times constrain the operation of the various branches of government. They are created as needed, although it is an unfortunate reality that their establishment is often prompted by tragedies ….

84 He quoted the observations of the commissioner into infant deaths in Toronto (at para. 63):

> …. They are not just inquiries; they are *public* inquiries .... I realized that there was another purpose to the inquiry just as important as one man's solution to the mystery and that was to inform the public. Merely presenting the evidence in public, evidence which had hitherto been given only in private, served that purpose. The public has a special interest, a right to know and a right to form its opinion as it goes along. [Emphasis in original.]

85 I am satisfied that there are fundamental differences between an inquest that might be conducted pursuant to the *FIA* and the Inquiry created

by the OIC. The most significant difference is in what must be answered, which in the case of an inquest is narrow, as it is dictated by the provisions of the *FIA*, whereas in the case of the Inquiry it is broad, as it is dictated by the policy decision of the LGIC as expressed in the uniquely created provisions of the OIC.

86 The only authority provided to me on what might be meant by "otherwise regulated" is the decision of the Ontario Court of Appeal in *Re Canadian Environmental Law Association et al. v. Pitura* (1981), 32 O.R. (2d) 605. Both parties cited *Pitura*, a case where the Ontario *Public Inquiries Act*, S.O. 2009 ch. 33 schedule 6, permitted the establishment of an inquiry if "the inquiry is not regulated by any special law." The court said (at pp. 606-7):

> There are no reported decisions on the meaning of "regulated by any special law"… but the purpose of the provision … is reasonably apparent. Broadly speaking, an inquiry as contemplated by the *Public Inquiries Act, 1971* is a legal process the function of which is to secure information and, sometimes, recommendations. ….
>
> [emphasis added]

87 The underlined portion above, in my view, could properly be applied to an "inquiry" under s. 83 of the *Act*. A "legal process" is a more appropriate descriptor of such an inquiry, with its potentially very broad mandate, than the dictionary's "formal or legal investigation."

88 The court continued (at p. 607):

> …. If the subject-matter and scope of an inquiry under the *Public Inquiries Act, 1971* is one with respect to which some other legislation makes special provision then resort to the *Public Inquiries Act, 1971* is not possible. The reason for this is that the

> provisions in the special legislation dealing with such matters as who is to conduct such inquiry, his powers, and procedures and safeguards will generally be more appropriate to the matter at hand than those in the general statute, the *Public Inquiries Act, 1971*. … [I]t would subvert the statutory scheme established by the "special law" to permit the creation of a commission under the *Public Inquiries Act, 1971* to occupy the field so as to pre-empt the inquiry provided for in the special law. ….
>
> [emphasis added]

89 As has been explained above, in my view, there are no provisions, whether procedural or substantive, in the *CFSA* or the *FIA* that are "more appropriate to the matter at hand" than the provisions in the OIC and the related provisions in the *Act*.

90 The court rejected the argument that the inquiry was regulated by "special law," saying (at p. 610):

> The present inquiry is a plain inquiry to obtain information and recommendations, and nothing more. The hearing provided for under the *Environmental Assessment Act, 1975* … is clearly part of an adjudicative process, a process leading to a decision affecting rights or interests. In our view, s. 2 of the *Public Inquiries Act, 1971* should not be interpreted as preventing the Lieutenant-Governor in Council from causing an inquiry to be made into matters of public concern where the inquiry does not duplicate, or substantially duplicate, the legal process relating to the inquiry regulated by the alleged special law so that the purpose of the special law would be frustrated. ….
>
> [emphasis added]

91 The Inquiry would not substantially duplicate the legal process of an inquest. Much of what an inquest judge would be mandated to ascertain has already been ascertained. Much, if not most, of what the respondent is

mandated to ascertain has not yet been ascertained, and could not be imposed on an inquest judge.

92 In summary, the subject-matter of the Inquiry is not "otherwise regulated" by either the *CFSA* or the *FIA*.

93 Thus, I conclude that the stated case that the applicant requests be decided by the Court of Appeal does not raise an arguable case and has no reasonable prospect of success.

94 I would dismiss the motion, with costs to the AG.

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SCHEDULE A

M A N I T O B A

O R D E R I N C O U N C I L

DATE: **March 23, 2011**

ORDER IN COUNCIL NO.: **89/2011**

RECOMMENDED BY: **Minister of Justice**

ORDER

1. The Honourable Edward (Ted) N. Hughes, OC, QC, LL.D (Hon) is appointed as commissioner to inquire into the circumstances surrounding the death of Phoenix Sinclair and, in particular, to inquire into:

   (a) the child welfare services provided or not provided to Phoenix Sinclair and her family under *The Child and Family Services Act*;

   (b) any other circumstances, apart from the delivery of child welfare services, directly related to the death of Phoenix Sinclair; and

   (c) why the death of Phoenix Sinclair remained undiscovered for several months.

2. The commissioner must report his findings on these matters and make such recommendations as he considers appropriate to better protect Manitoba children, having regard to the recommendations, as subsequently implemented, made in the reports done after the death of Phoenix Sinclair, set out in paragraph 3.

3. To avoid duplication in the conduct of the inquiry and to ensure recommendations relevant to the current state of child welfare services in Manitoba, the commissioner must consider the findings made in the following reviews and the

manner in which their recommendations have been implemented. He may give the reviews any weight, including accepting them as conclusive:

(a) A Special Case Review In Regard To The Death Of Phoenix Sinclair, Andrew J. Koster and Billie Schibler (September, 2006)

(b) Investigation into the Services Provided to Phoenix Victoria Hope Sinclair, Department of Justice, Office of the Chief Medical Examiner (September 18, 2006)

(c) Strengthen The Commitment An External Review of the Child Welfare System, Michael Hardy, Billie Schibler and Irene Hamilton (September 29, 2006)

(d) "Honouring Their Spirit", The Child Death Review: A Report to the Minister of Family Services and Housing, Province of Manitoba, Billie Schibler and James H. Newton (September, 2006)

(e) Strengthening our Youth: Their Journey to Competence and Independence, A Report on Youth Leaving Manitoba's Child Welfare System, Billie Schibler, Children's Advocate, and Alice McEwan-Morris (November, 2006)

(f) Audit of the Child and Family Services Division, Pre-devolution Child in Care Processes and Practices, Carol Bellringer, Auditor General (December, 2006)

4. The commissioner may also consider any court transcripts and similar documents, which are not subject to a legal claim of privilege, and may give them any weight, including accepting them as conclusive.

5. The commissioner must perform his duties without expressing any conclusion or recommendation about civil or criminal liability of any person.

6. The commissioner must complete his inquiry and deliver a final report containing his findings, conclusions and recommendations to the Minister of Justice and Attorney

General by March 30, 2012. He may also give the Minister of Justice and Attorney General any interim reports that he considers appropriate to address urgent matters. All reports must be in a form appropriate for public release, but release is subject to *The Freedom of Information and Protection of Privacy Act* and other relevant laws.

7. Nothing in paragraph 1 limits the commissioner's right to request the Lieutenant Governor in Council to expand the terms of reference to cover any matter that he considers necessary as a result of information that comes to his attention during the course of the inquiry.

8. Government departments and agencies and other bodies established under the authority of the Manitoba Legislature must assist the commissioner to the fullest extent permitted by law.

9. Before public hearings take place, the commissioner may interview any person connected with the matters referred to in paragraph 1. On the commissioner's behalf, interviews may be conducted by counsel for the commissioner, either alone or in the commissioner's presence. If conducted alone, counsel must give the commissioner a transcript or a report of each interview. The commissioner may, in his discretion, rely on the evidence gathered in this manner.

10. The Minister of Finance may pay the following amounts from the Consolidated Fund, at the request of the Minister of Justice and Attorney General:

    (a) travelling and other incidental expenses that the commissioner incurs conducting his inquiry;

    (b) fees and salaries of any advisors and assistants employed or retained for the purpose of the inquiry;

    (c) any other operational expenditures required to support the inquiry.

11. This Order is effective immediately.

. . . . .